

These are the tentative rulings for civil law and motion matters set for Thursday, October 23, 2014, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, October 22, 2014. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0060594 Jones-Mark, Robin vs. Dane, Diana

The appearances of the parties are required on defendant's application for stay of writ of execution.

2. M-CV-0061684 CACH, LLC vs. Ebert, Bruce

Defendant's motion for "appropriate relief" is denied. The motion does not include a noticed motion compliant with CRC Rule 3.112; nor proper points and authorities compliant with CRC Rule 3.113; nor the tentative ruling information required by Local Rule 20.2.3. Counsel for defendant is admonished that law and motion papers must comply with all applicable statutes and rules.

3. M-CV-0062018 Aldea Homes Inc. vs. Raubitschek, Maura A.

Defendant's Demurrer to the Complaint is overruled. Defendant is ordered to file and serve an answer or denial on or before October 28, 2014. (CCP§1167.3.) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) As such, all properly pled facts are assumed to be true as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.) The complaint complies with Code of Civil Procedure §1166 as (1) the complaint has been

verified, (2) the facts for which recovery is based are sufficiently set forth in the complaint, (3) the premises are described with reasonable certainty, and (4) the method for service is attached to the complaint.

4. M-CV-0062046 Howard, Paul vs. Estep, Kelly, et al

The appearances of the parties are required on defendant's application for stay of writ of execution.

5. M-CV-0062070 Doyle Ranch Owners' Ass'n vs. Alvarado, Victor

Defendant's motion to set aside default is denied as defendant has not attached a proposed answer or general denial as required under CCP§473(b).

6. M-CV-0062206 Haney, Adam L. vs. Williams, Charles, et al

The motion for summary judgment is dropped from the calendar as no moving papers were filed with the court.

7. S-CV-0023628 Kenitzer, Deborah vs. Sierra Community College District

The unopposed motion to amend judgment is granted. The judgment shall be amended to allow for \$214,502.20 in recoverable attorney's fees and costs.

8. S-CV-0027264 JB Development, LLC vs. Brelle West Const. Mgmt., et al

The two motions to fix amount of attorney's fees are continued, on the court's own motion, to November 6, 2014 at 8:30 a.m. in Department 40.

9. S-CV-0029671 Colby, Diane vs. Poidmore, Anthony

This tentative ruling is issued by the Honorable J. Richard Couzens. If oral argument is requested, it shall be heard on **October 24, 2014 at 1:30 p.m. in Department 3.**

Defendant Anthony Poidmore's request for judicial notice is granted. Defendant's objections to evidence, Nos. 1-5, and 7-9, are sustained. Objection No. 6 is overruled.

Plaintiff Diane Colby's Motion to Set Aside or Vacate Verdict and Rule in the Alternative, to Reopen Trial or for a New Trial, is denied.

This action proceeded to a jury trial between July 21 – August 7, 2014, resulting in a verdict in favor of the defense. Plaintiff's motion is based on three complaints: (1) testimony of witness James Ghielmetti was false and/or could be controverted by other evidence; (2) the court should have admitted the declaration of Gary Deal, a juror in the underlying action; and (3) in light of surprise testimony by defendant Anthony Poidmore

that he had told the judge in the underlying action everything about his medical issues, the court should have reviewed or admitted defendant's medical records.

A motion to vacate and enter a different judgment under Code of Civil Procedure section 663 may be granted where the moving party establishes by uncontroverted evidence that a judgment is inconsistent or unsupported by the jury's verdict. Code Civ. Proc. § 663. Such a motion does not permit the court to reweigh facts. It lies only on the basis of uncontroverted evidence. *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153. The basis of plaintiff's motion is not that uncontroverted evidence supports reversal of the judgment, but rather that conflicting evidence exists which, if considered, might have persuaded the jury that defendant's conduct fell below the standard of care. The court lacks power to act under Code of Civil Procedure section 663 where there is evidence on both sides of the issue. *Id.*

Moreover, to the extent plaintiff intended to move for relief under Code of Civil Procedure section 663, the motion was procedurally deficient, as plaintiff failed to file and serve a notice of intention to move to set aside the judgment, designating the grounds upon which the motion would be made, and specifying the particulars in which the judgment was erroneous. Code Civ. Proc. § 663a(a). Additionally, as more than 60 days have elapsed since service on the moving party of written notice of entry of judgment, the court no longer has the power to set aside and vacate the judgment under this code section. Code Civ. Proc. § 663a(b).

Defendant suggests that plaintiff's motion is actually a mis-titled motion for judgment notwithstanding the verdict, under Code of Civil Procedure section 629. A JNOV motion challenges the legal sufficiency of the evidence submitted by the opposing party. See *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110. As with the motion to vacate and enter a different judgment, the court may not reweigh evidence or witness credibility. *Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal.App.4th 1497, 1510. "If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied." *Teitel v. First Los Angeles Bank* (1991) 231 Cal.App.3d 1593, 1603. Plaintiff does not establish that the evidence was insufficient to support a defense verdict. Instead, she asserts that conflicting evidence exists which, if credited, supported her position.

To the extent plaintiff suggests that it was error for the court to exclude certain evidence, including the declaration of former juror Gary Deal, and defendant's medical records, plaintiff offers no persuasive support for such a finding. Code of Civil Procedure section 98, cited by plaintiff, is inapplicable in this unlimited civil action. The court granted defendant's *in limine* motion to exclude his medical records. Plaintiff fails to explain how this ruling was erroneous, or why testimony by defendant that the judge in the underlying action was told everything about his medical issues somehow compelled disclosure of all of defendant's medical records.

Finally, the last paragraph of plaintiff's motion asks the court to consider granting a new trial in the alternative. A party moving for a new trial is required to file and serve

a “notice of intention to move for a new trial” as the first step. Code Civ. Proc. § 659. The notice of intent to move for new trial must designate all grounds upon which the motion will be made, and whether it will be made upon affidavits, or the minutes of the court, or both. Code Civ. Proc. § 659. Plaintiff in this case failed to file and serve a notice of intent, and even in her motion fails to clearly designate the grounds upon which the motion is made. It appears that plaintiff’s motion may seek a new trial on grounds of irregularity in the proceedings and surprise, based on defendant’s testimony that the judge in the underlying action was told everything about his medical issues. Such grounds for a new trial motion must be supported by affidavit or declaration. Code Civ. Proc. § 658.

In this case, the only admissible evidence submitted by plaintiff was her own declaration, which contains no information supporting her assertion of irregularity in the proceedings or surprise based on defendant’s testimony. While the court notes that juror affidavits are in some cases admissible when a party seeks a new trial on the ground of irregularity in the proceedings of the jury or jury misconduct, in this case, the intent of plaintiff offering the declaration of Gary Deal was not to demonstrate jury misconduct in this case, but to impeach the verdict in the underlying case. As such, the declaration was offered for an improper purpose, and properly excluded. Evid. Code § 1150; *People v. Hutchinson* (1969) 71 Cal.2d 342, 350.

Furthermore, as more than 60 days have elapsed since service on the moving party of written notice of entry of judgment, any motion for new trial would be denied by operation of law. Code Civ. Proc. § 660.

10. S-CV-0030314 Belisle, David, et al vs. Centex Homes, et al

The motion for leave to serve form interrogatories; motion for judgment on the pleadings; motion for leave to file a first amended cross-complaint; and motion for summary judgment and/or summary adjudication are continued to November 13, 2014 at 8:30 a.m. in Department 42 to be heard in conjunction with the pending motion to compel discovery.

11. S-CV-0030874 Powers, Craig vs. East West Partners-Tahoe, Inc.

Defendant East West Partners-Tahoe, Inc.’s Motion to Strike, Demurrer, and Motion to Dismiss are denied; the demurrer is overruled. Contrary to defendant’s assertions, the inclusion of its name in the title caption of the second amended complaint does not affect the sufficiency of the pleading as the caption is not a part of a cause of action. (see *McDonough v. Waxman* (1930) 103 Cal.App. 169, 173; *Franco Western Oil Co. v. Cameron* (1962) 200 Cal.App.2d 37.) Defendant is no longer a party to the action as defendant was dismissed from this action on June 13, 2012 and there are no factual allegations against defendant in the body of the second amended complaint.

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12. S-CV-0031137 Ripper, John vs. Stevenson, Matthews

This tentative ruling is issued by the Honorable Michael W. Jones. If oral argument is requested, it shall be heard on October 23, 2014 at 8:30 a.m. in Department 43.

Defendant's Motion to Tax and Strike Costs is granted in part.

The motion is granted with respect to expert witness fees relating to depositions of defense experts. Code Civ. Proc. § 1033.5(b). Plaintiff is however entitled to ordinary witness fees of \$105 with respect to the depositions of Thomas Mampalam, M.D., Daniel D'Amico, M.D. and Robert Allen, Ph.D.

The motion is also granted with respect to fees for exhibits in the amount of \$19,900. Expenses for such items must be reasonably helpful to aid the trier of fact, meaning that costs for exhibits not actually used at trial are not recoverable under Code of Civil Procedure section 1033.5(a)(13). *Ladas v. Cal. State Auto. Ass'n* (1993) 19 Cal.App.4th 761, 774; *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1557-1558. Defendant has adequately demonstrated that in light of the description of services provided on the DK Global invoice for \$19,800, it appeared that costs were requested for trial exhibits not used at trial. Accordingly, the burden shifted to plaintiff to establish such costs were permissible under the Code of Civil Procedure. While plaintiff's opposition establishes the propriety of costs in the amount of \$7,825.00 for a "Biomechanics Presentation" (Invoice # 13056), plaintiff fails to adequately support the necessity or helpfulness of costs in the amount of \$19,900 (Invoice # 12992).

Plaintiff is awarded unchallenged costs in the amount of \$6,538.20, plus \$7,825 for vehicle/occupant dynamics exhibits from DK Global and \$105 in ordinary witness fees, for a total of \$14,468.20.

13. S-CV-0032158 Gortner, Catherine Willis, et al vs. Royal Gorge, LLC

The motion to compel is dropped from the calendar at the request of the moving party.

14. S-CV-0032790 Singh, Rebecca, et al vs. Gurnee & Daniels, LLP

The motion for leave to file first amended answer and motion to stay proceedings are continued to October 30, 2014 at 8:30 a.m. in Department 40.

15. S-CV-0033410 Jones, Suzanne vs. Westfield, LLC, et al

The motion for summary judgment is dropped from the calendar as no moving papers were filed with the court.

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16. S-CV-0033566 Thornton, Robert, et al vs. East West Partners, Inc., et al

The motion to certify class action is continued to November 13, 2014 at 8:30 a.m. in Department 42 at the request of the moving party.

17. S-CV-0033644 Salwin, Roses vs. McElravey, Michael, et al

Defendant's unopposed motion to compel discovery is granted. Plaintiff shall serve verified responses and responsive documents, without objections, to form interrogatories, set one; special interrogatories, set one; and request for production of documents, set one on or before October 31, 2014.

Sanctions are denied because the motion was not opposed. (CCP§2030.290(c); 2031.300(c).) However, repeated conduct of failing to comply with discovery obligations may lead the Court to find an abuse of the discovery process and award sanctions on that basis. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, overruled on other grounds in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4.)

18. S-CV-0033706 Medcalf, Frank, et al vs. Smith, Richard, et al

Defendants' Demurrer to the Second Amended Complaint

Ruling on Request for Judicial Notice

Plaintiff's request for judicial notice is granted.

Ruling on Demurrer

A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

The demurrer is overruled as it pertains to the first and fourth causes of action since the court previously determined these causes of action were sufficiently pled. (*Bennett v. Suncloud* (1997) 56 Cal.App.4th 91.

The demurrer is sustained as to the second and third causes of action. Specifically, the second cause of action for constructive trust suffers from the same deficiencies seen in the FAC as the property is not sufficiently identified. (*Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1114.) The third cause of action for unjust enrichment also fails since the claim is pled as a common count, which does not lie where the obligation is for something other than the payment of money. (*Weizenkorn v.*

Lesser (1953) 40 Cal.2d 778, 793.) Since these deficiencies are substantially similar to those raised in the prior demurrer but plaintiffs were unable to remedy the deficiencies, the demurrer as to the second and third causes of action is sustained without leave to amend.

Defendants' Motion to Strike

The motion is granted as to plaintiffs' prayer for punitive damage since the SAC still fails to allege sufficient facts to support punitive damages.

19. S-CV-0033782 Union Bank, N.A. vs. Lichau & Assoc. Architects, Inc., et al

Plaintiff's unopposed motion for attorney's fees is granted. The court finds that 74 hours at a rate of \$225 per hour are reasonable in this case. Plaintiff is awarded \$16,650.00 in attorney's fees.

20. S-CV-0034010 Beadle, Marva vs. Allied Trustee Services, et al.

The three demurrers are continued, on the court's own motion, to November 4, 2014 at 8:30 a.m. in Department 32 to be heard by the Honorable Mark S. Curry.

21. S-CV-0034118 Mejia, Marto vs. Roofline, Inc., et al

Defendant's unopposed motion to responses to interrogatories is granted. Plaintiff shall serve verified responses, without objections, to form interrogatories, set one on or before October 31, 2014.

Sanctions are denied because the motion was not opposed. (CCP§2030.290(c); 2031.300(c).) However, repeated conduct of failing to comply with discovery obligations may lead the Court to find an abuse of the discovery process and award sanctions on that basis. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, overruled on other grounds in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4.)

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22. S-CV-0034268 Selwyn D.J. Vos vs. Reconstuct Company, N.A.

This tentative ruling is issued by the Honorable Michael W. Jones. If oral argument is requested, such argument shall be heard at 8:30 a.m. in Department 43:

Plaintiff's Motion for Reconsideration is denied. Code of Civil Procedure section 1008(a) allows a party to seek reconsideration and entry of a different order. The moving party, however, must (1) bring the motion before the same judge; (2) make the motion within 10 days after service of the notice of entry of order; (3) base the motion upon "new or different facts, circumstances or law" other than those before the court at the time of the original ruling; (4) support the request with a declaration establishing new or different facts, circumstances, or law; and (5) bring the request before the entry of judgment. (Code of Civil Procedure section 1008(a).) A motion for reconsideration is properly denied where the moving party does not meet the statutory requirements of section 1008. As seen here, plaintiff has failed to meet the minimum statutory requirements as he has not shown that plaintiff's request is based upon "new or different facts, circumstances or law".

A reconsideration motion is properly denied where it presents facts and circumstances that were raised, known, and presented at the hearing on the original motion. (*Gaines v. Fidelity National Title Insurance Co.* (2013) 222 Cal.App.4th 25, 47-48.) The crux of plaintiff's assertion here is that the court should reconsider the untimeliness of defendant's demurrer. This issue was raised, considered, and addressed by the court in its September 26, 2014 ruling on the demurrer. Plaintiff has not sufficiently established the presents of new or different facts, circumstances or law to warrant reconsideration. For these reasons, the motion is denied.

23. S-CV-0034354 State Farm Mutual Auto Ins. Co. vs. Eddin, Ameer Jamal

The unopposed Motion to Set Aside Default is granted. The stipulation and order to set aside the default lodged with the court shall be entered forthwith.

24. S-CV-0034367 Schmidt, Marie J. - In Re the Petition of

The motion to appoint special master is dropped from the calendar as no moving papers were filed with the court.

25. S-CV-0034778 Shaw, John Eric vs. Calif. Dept. of Justice

The appearances of the parties are required for the hearing on the petition for writ of mandate.

26. S-CV-0034806 Cummings, Lance vs. Lindsay, Christopher

Defendant's unopposed Motion to File Cross-Complaint is granted. Defendant shall file and serve his cross-complaint on or before October 31, 2014.

The motion to stay proceeding is continued to October 30, 2014 at 8:30 a.m. in Department 40.

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